IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

On Appeal From The
United States District Court For The
Southern District of Texas

* * *

BRIEF OF APPELLANTS

* * *

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February, 1975

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Appellees

* * *

On Appeal From the
United States District Court For The
Southern District of Texas

* * *

BRIEF OF APPELLANTS

This is an appeal from a judgment of a three-judge United States District Court sitting in the Southern District of Texas entered on August 20, 1974, holding unconstitutional a portion of the Texas Election Code.

OPINION BELOW

The opinion of the court below is reported at 382 F. Supp. 801 and is reprinted in the Appendix to the Jurisdictional Statement. (A.J.S.)

JURISDICTION

This suit was brought under 42 U.S.C., Sec. 1983, and 28 U.S.C., Sec. 1343. Jurisdiction of the three-judge district court was invoked under 28 U.S.C., Sections 2281 and 2284. Notice of appeal from the judgment of August 20, 1974, was given on August 23, 1974 (A.J.S. 62)

This court has jurisdiction by direct appeal under 28 U.S.C., Sections 1253 and 2101(b), and the appeal was timely docketed.

STATUTE INVOLVED

In 1973 the Texas Legislature amended Subsection (b), Article 14.10 of the Texas Election Code (Acts 1973, 63rd Leg., Ch. 423, p. 1101, The Campaign Reporting and Disclosure Act of 1973) so that it, as amended now reads:

"Art. 14.10 Political advertising

"(b) No political advertising shall

be accepted for printing, publication, or broadcasting unless a copy of the matter to be printed or published, signed by the individual contracting therefor and showing his full address and, if he is acting as an agent, showing also the name of the candidate, political committee, or business entity he represents, is deposited with printer, publisher, or broadcaster accepting the advertising shall preserve the signed copy for a period of one year after the date of the election to which the advertising relates, and shall permit any interested individual to inspect the signed copy at any time during business hours, but only after the advertising has been printed, published, or broadcast. Such advertising shall be labeled as political advertising in the advertisement as printed, published or broadcast. Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising.

"Any individual, firm, or corporation who violates the provisions of this Section shall be guilty of a felony and upon conviction shall be fined not less than $100 nor more than $5,000 or be imprisoned not less

than one year nor more than five years or be both so fined and imprisoned."

All of Article 14.10, Texas Election Code is reprinted at pages 65 through 68 of the Appendix to the Jurisdictional Statement.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE.

STATEMENT OF THE CASE

Since Article 14.10 of the Texas Election Code was first adopted in 1951 (Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 246) the statutes of Texas have required that political advertising be identified as such and since 1967 reveal at least either the name of the person paying for or printing it. As the result of political scandals, both locally in Texas and upon the national scene, the Texas Legislature adopted the Campaign Reporting and Disclosure Act of 1973 which tightened up the election provision governing campaign expenditures in several respects, only one of which was the amendment of Article 14.10 to require that both the name of the person paying for political advertising and the printer or publisher be shown.

The amendment to Article 14.10 was effective June 14, 1973. This suit was filed on September 11, 1973, at a time when there were no major elections pending in the state. It is not alleged that any effort has been made to enforce the amended provisions of Article 14.10(b) against any of the Appellees or any other member of the printing industry. Despite assertions by Appellees of "uncontradicted testimony" and of evidence under oath (see for example Appellees Motion to Affirm, pp. 3, 7, and 10) and similar statements in the opinion of the court below (A.J.S., pp. 29 and 38), the fact of the matter is that no evidence was heard by the court. Thus, there is no evidence of how the Act would be interpreted and enforced by Mark White, Secretary of State of the State of Texas, one of the Appellants, and charged by statute (Article 1.03, Texas Election

Code) with the responsibility for the enforcement and uniform application of the Texas election laws. There is no evidence in the record of how any particular printer might react or how the printing industry as a whole would react to the statute. There is no evidence that the statute, if enforced, would have a "chilling" effect upon First Amendment rights; no evidence that anyone has refused printing that has been tendered by an unpopular cause; nor any identification of the unpopular causes who will embarrass Appellees.

Nevertheless, the District Court rendered a forty-page opinion finding inter alia that Appellees " have demonstrated under oath the legitimate, bona fide fear of intimidation, harassment, and reprisal, both economic and physical, if they are required to print their names on all political advertising." (382 F. Supp. at 810 to 811).

The three-judge court entered its order holding that so much of Article 14.10(b) of the Election Code which reads:

> "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising"

was unconstitutional and it enjoined the State from enforcing those provisions. (A.J.S., pg. 60.)

On October 11, 1974, this Court entered its order staying judgment of the district court pending

the timely docketing of an appeal and the final disposition thereof. (A.J.S., pg. 69.)

ARGUMENT

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

Surely the rights conferred by the First Amendment are not unlimited. No one, not even a printer, can stand in a crowded theatre and yell "Fire!" The rights conferred by the amendment carry with them certain responsibilities. Traditionally, these have been enforced by laws of libel and slander and others of like kind. Assuming for the moment that the statute in question actually involves infringement on Appellees' First Amend-

ment guarantees, surely it is not enough to show the possibility that a state law may at some future time unreasonably infringe upon First Amendment rights to have the law declared unconstitutional.

In his dissent in Talley v. California, 362 U.S. 60 (1960), Mr. Justice Clark, joined by Mr. Justice Frankfurter and Mr. Justice Whittaker, said:

> "Therefore, before passing upon the validity of the ordinance, I would weigh the interests of the public in its enforcement against the claimed right of Talley. The record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name. Unlike National Asso. for Advancement of Colored People v. Alabama, . . ., which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion (or) other manifestations of public hostility' . . . Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance

> down." (362 U.S. at 69).[1]

The record in this case is subject to the same criticism. Appellees had the burden of proving that enforcement of Article 14.10(b) of the Texas Election Code would unreasonably infringe upon rights guaranteed to them by the First Amendment. They made no effort at all to offer such proof. The record contains no testimony and no evidence. Appellants submit that whether or not the questioned statute had a chilling effect upon First Amendment rights or whether it unreasonably restrained them was a question of fact upon which Appellees had the burden of producing relevant evidence.

In the Jurisdictional Statement, at pages 23 to 25, we have noted some thirty-five other states having similar statutory provisions. We also cited to the Court section 612 of Title 18 of the United States Code, as amended August 12, 1970, Public Law 91-375, 84 Stat. 777, which provides in part:

> "Whoever willfully publishes or distributes or causes to be published or distributed . . . any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any

---

[1] Similarly, during the course of a recent argument before this Court (John L. Hill v. Stone, No. 73-1723, October Term, 1973), Mr. Justice White commented, critically, on the complete absence of evidence as to the manner in which the particular state statute involved was administered.

person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to Congress . . . which does not contain the names of the persons, associations, committees, or corporations responsible for the publication or distribution of the same, and the names of the officers of each such association, committee, or corporation, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Although that statute has been challenged on the same grounds that Appellees now challenge Article 14.10(b) of the Texas Election Code, it has never been held to violate the First Amendment.

In United States v. Scott, 195 F. Supp. 440 (D. N.D. 1961), involving an indictment alleging violation of that statute, the Court said:

> "Trial courts are well advised to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the enactment of legislation when its constitutionality is under attack.
>
> "The Congress determined that in certain specified instances the writers of pamphlets must disclose their identity. And why was this done? So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently? Is it not perfectly apparent what havoc could be wrought by anonymous publications concerning candidates enumerated under Sec. 612?
>
> "The Defendant's theory of fear of reprisal is highly speculative and conjectural, and it may be added, any citizen of the country could urge the same argument in like circumstances and compel the courts to attempt to forecast the danger of reprisal. The mere possibility of reprisal is not enough.
>
> "There may always be men who might think in terms of reprisal, but there will always be courts to protect the intimidated from the intimidators." (195 F. Supp. at 443.)

In United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973) reversed on other grounds, United States v. Insco, 496 F.2d 204 (5th Cir. 1974), con-

tentions that 18 U.S.C. 612 was unconstitutional under the doctrine of Talley v. California, supra, were likewise rejected.

Section 457 of the election law of the State of New York requires on printing for political purposes the printing of the name and post office address of the printer and of the person or committee at whose instance or request the printing was done. In People v. Duryea, 351 N.Y.S. 2d 978 (N.Y. Sup. 1974), the validity of this statute was attacked on two grounds, one that it violated the First Amendment and two, that it was overly broad. In a very scholarly and well-reasoned opinion, in which the cases which Appellees now cite were discussed, Justice Roberts concluded that, while the statute was overly broad, it did not violate the First Amendment guarantees. In passing the Court said:

> "Perhaps the statute strictly limited to the activities of campaign organizations would survive First Amendment scrutiny, justified by the same interests that spawned the contribution and expenditure laws, if it did not otherwise infringe on First Amendment rights . . . " (351 N. Y.S. 2d at 993.)

Article 14.10(b) of the Texas Election laws is limited to campaign publications. If the Court is to hold that it is unconstitutional as violating First Amendment guarantees, the Court will in effect throw out the statutes of two-thirds of the states of the Union as well as of the United States

itself.

Appellees at page 22 of their Motion to Affirm asked the Court to distinguish section 612 of Title 18 on the ground apparently, that the offices with which it is concerned are more important than the offices encompassed by Article 14.10(b). Aside from the fact that Article 14.10(b) applies to all political campaigns, and thus would encompass those encompassed by section 612, and that in fact many "lesser" elections may have equal if not greater impact on the voter, the reasoning is highly fallacious.

Consideration of Article 14.10(b) should properly be made in line with United States v. Scott, supra; United States v. Insco, supra; People v. Duryea, supra; as well as the long-standing cases of Lewis Publishing Co. v. Morgan, 299 U.S. 288 (1913) and United States v. Harriss, 347 U.S. 612 (1954). These cases involve disclosure requirements directly related to an essential governmental responsibility and interest which were upheld. Appellees attempt to distinguish the direct identification requirement of the press in Lewis Publishing Co. v. Morgan, on the grounds that it involved the power of Congress to control the mails and required such disclosure only of persons "desirous of availing themselves of the benefits of lower mail costs." (Motion to Affirm, pg. 19.) However, this view of Lewis emphasizes its similarity to the case at bar. This case involves the powers of a state to control the election process and requires disclosure only of persons desirous of availing themselves of the economic benefits de-

rived from printing campaign material.

Likewise, Appellees' attempt to disregard United States v. Harriss must fall. The " limiting construction of the term 'lobbying' " urged by Appellees to avoid First Amendment questions, in fact was undertaken by this Court to avoid a finding of unconstitutionality on the grounds of vagueness. Moreover, this Court in speaking of the First Amendment questions, recognized the realities of the situation to which Congress had responded, and correctly found that the Federal Lobbying Act did not seek to prohibit lobbying, merely asked for a "modicum of information" and in so doing used its power "in a manner restricted to its appropriate end." 347 U.S. at 625, 626. So, too, the Texas Legislature has not sought to prohibit printing of campaign material or even to prohibit anonymous printing of political positions or philosophies, but has only asked for a "modicum of information" from that group of people doing a certain type of printing from which they derive an economic benefit. This, too, represents a valid use of the power and responsibility of the state to regulate elections in a manner restricted to that appropriate end.

Therefore, as evidenced in Scott, Insco, and Duryea, the questions presented in cases such as this one have not been precluded by Talley v. California, supra. The Los Angeles ordinance considered in Talley had no relation to a well-defined area of state responsibility reflected in a statutory scheme designed to meet that responsibility. Talley is equally not controlling in this case because there the ordinance was struck down primarily on the

grounds of overbreadth, an issue not present here.

Appellants believe that the foregoing discussion alone demonstrates and supports the conclusion that Article 14.10(b) is a constitutional exercise of state authority which has not been shown to infringe on constitutional freedom. However, as set out in our Jurisdictional Statement at pages 10 through 17, Appellants also believe that the printers and publishers do not have an absolute right to publish anonymously and that the speech and associational right Appellees attempt to clothe with constitutional stature is beyond the penumbra of First Amendment protection. Without repeating what this Court has before it and considered already in our Jurisdictional Statement, the fact is that Appellees are asking this Court to extend the protection of the Constitution to speech which consists of a name only and expresses nothing of political or social importance, and to an association which is no more than an economic relationship without any purpose of the promotion or expression of ideas or positions by Appellees. Appellees are in essence asking this Court to invalidate a state scheme for regulation of the election process solely to enable Appellees to engage in a certain profitable enterprise--printing campaign material--in a manner they prefer.

When the Court considers the circumstances which spawned the 1973 amendments to Texas Election Code, the absence of any showing that this particular statute will be or has been construed and enforced to cause the slightest chill on First Amendment rights, and the actual nature of the

rights sought to be protected, Appellants submit that this Court should conclude that no violation of the United States Constitution has been shown or exists and reverse the court below.

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE.

A second and independent ground upon which the district court based its decision to enjoin the enforcement of Article 14.10(b) is the provision's requirement that the name and address of "the person paying for the advertising" is so vague as to render it constitutionally deficient. The district court readily accepted plaintiffs' argument that the meaning of the phrase is so indefinite as to render printers and publishers incapable of determining whose name is to be placed on the advertisement, thereby subjecting them to criminal liability. But in reaching this conclusion, the district court ignored the legislative scheme in which it is found in order to create uncertainty where there is none. For when the phrase is read in context, its meaning is readily apparent.

Printers and publishers apparently had no difficulty in understanding to whom the phrase referred and complying with the requirement for six years. As previously set out, from 1967 to 1973 the printers were given the option of printing their own name or that of the person paying for the political advertising. Since they so strenuously object to identifying themselves, and there is no record

of a printer being prosecuted under Article 14.10(b), compliance with the statute was achieved by doing precisely what the printers now say they cannot do because they do not know who the person paying for the political advertising is. The previous absence of confusion or misunderstanding of this phrase is explained by an examination of the phrase in context. Subsections (a) and (b) of Article 14.10 are as follows:

> "(a) Anything published in a newspaper, magazine or journal or any pamphlet, handbill, or other printed matter, or anything broadcast over a radio or television station or displayed on a billboard, in favor of or in opposition to any candidate for any public office or office of a political party, or in favor of or in opposition to the success of any public officer, or in favor of or in opposition to any political party, or in favor of or in opposition to any proposition submitted to a vote of the people, in consideration of the receipt or promise of money or other thing of value, shall for the purposes of this section be considered as political advertising. All advertisements of marked ballots, advising or suggesting how voters should mark their ballots, shall be included in the meaning of political advertising.
>
> "(b) No political advertising shall

be accepted for printing, publication, or broadcasting unless a copy of the matter to be printed or published, signed by the individual contracting therefor and showing his full address and, if he is acting as an agent, showing also the name of the candidate, political committee, or business entity he represents, is deposited with printer, publisher, or broadcaster accepting the advertising. The person accepting the advertising shall preserve the signed copy for a period of one year after the date of the election to which the advertising relates, and shall permit any interested individual to inspect the signed copy at any time during business hours, but only after the advertising has been printed, published, or broadcast. Such advertising shall be labeled as political advertising in the advertisement as printed, published or broadcast. Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising.

"Any individual, firm, or corporation who violates the provisions of this Section shall be guilty of a felony and upon conviction shall be fined not less than $100 nor more than $3,000

or be imprisoned not less than one year nor more than five years or be both so fined and imprisoned."

The requirement that the printer be given the identity of the person contracting for the printing and, if he is an agent, the entity he represents, existed prior to the 1973 amendment to the subsection. The resulting disclosure of either name appearing on the political advertising clearly complied with the requirement and was consistent with the statute's purpose.

Even without this six year history of compliance, the phrase in question could be constitutionally sustained under the vagueness tests established by this Court. The leading statement of the vagueness doctrine is contained in Connally v. General Construction Co., 269 U.S. 385, 391 (1925):

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In resolving vagueness questions, however, the Supreme Court has recognized that there are limitations in the English language with respect to being both specific and manageably brief and accordingly has held that when a statute is set out in terms which the ordinary person exercising ordinary common sense can sufficiently understand and

comply with it will be upheld. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). See also Arnett v. Kenedy, ____ U.S. ____, 94 S.Ct. 1633 (1974) and United States v. Vuitch, 402 U.S. 62 (1971). Thus a statute does not have to satisfy the objections of all those intent upon finding fault with it at any cost. As long as the prohibition or requirement of a statute is reasonably understandable, it will be upheld.

When subjected to the foregoing standards, the phrase "person paying for the advertising" passes constitutional muster. If taken literally, the phrase clearly refers to the person or entity ultimately responsible for finding an advertisement, a fact possibly unknown to the printer. But, as stated above, taken in the context of Subsection (b), that hypothetical situation does not arise.[2] The printer will always have the name of the person contracting for the political advertising and, if he is an agent, the name of the candidate, political committee, or business entity he represents.

Again this claim of vagueness is analogous to the one asserted in United States v. Harriss, supra, wherein Chief Justice Warren speaking for the majority stated:

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[2] In fact it is doubtful that a printer or publisher would ever be prosecuted for a violation of the statute so long as the name of someone reasonably related to the purchase of the advertisement is printed on its face. See Tex. Penal Code, Articles 8.02 and 8.03.

" . . . if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541. Cf. Jordan v. DeGeorge, 341 U.S. 223, 231, 71 S. Ct. 703, 707, 95 L.Ed. 886. And if this general class of offenses can be made constitutionally definite, by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." 347 U.S. at 618.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the court below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, First Special Assistant Attorney General of Texas, as of counsel for Appellants herein, hereby certify that true and correct copies of the above foregoing Brief of Appellants have been served upon opposing counsel by placing copies in the mail, prepaid, to Mr. Gerald M. Birnberg, Attorney at Law, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006, Counsel for Plaintiffs-Respondents; Mr. David Crump, Attorney at Law, 7018 Timber Lane, Houston, Texas 77027, Counsel for Common Cause Amicus Curiae; Mr. Joe S. Moss, Assistant District Attorney, 301 San Jacinto, Houston, Texas 77002, counsel for Defendant-Petitioner Carol S. Vance; and Mr. Leon Hirsch, Attorney at Law, 777 Houston First Savings Building, Houston, Texas 77002, counsel for Amicus Curiae Houston Chapter of the American Civil Liberties Union.

Witness my hand this ____ day of February, 1975.

_____
ELIZABETH B. LEVATINO